No. 14,262

United States Court of Appeals

For the Ninth Circuit

PERCY P. DAVIS,

Appellant,

vs.

GUY F. ATKINSON COMPANY, a corporation, and J. A. JONES CONSTRUCTION COMPANY, a corporation,

Appellees.

APPELLEES' REPLY BRIEF.

LLOYD H. BURKE,
United States Attorney,
GEORGE A. BLACKSTONE,
Assistant United States Attorney,
424 Post Office Building, San Francisco 1, California.
Attorneys for Appellees.

FILED
JUL 22 1954
PAUL P. O'BRIEN
CLERK

PERKINS-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

No. 14,262

United States Court of Appeals
For the Ninth Circuit

PERCY P. DAVIS,
Appellant,

vs.

GUY F. ATKINSON COMPANY, a corporation, and J. A. JONES CONSTRUCTION COMPANY, a corporation,
Appellees.

APPELLEES' REPLY BRIEF.

JURISDICTION.

Appellees deny that the District Court had jurisdiction of this action. Appellant attempts to base jurisdiction on diversity of citizenship, 28 U.S.C. §1332. However, there is no allegation in either the original complaint (R. 3-9) or the amended complaint (R. 33-40) as to the state of which appellant was a *citizen* at the time of commencement of the action. All that is alleged is that appellant "during all of the times herein mentioned * * * was a dentist duly authorized to practice his profession and maintaining an office in the City of New York City, State of New York, and residing in said City of New York City, and * * *

was a member of the Board of Health of said city." (Complaint II, R. 3; Amended Complaint I, R. 33) Allegations of *residence* are not tantamount to allegations of citizenship in establishing diversity jurisdiction.

Realty Holding Co. v. Donaldson, 268 U.S. 398, 399, 45 S.Ct. 521 (1925);

Steigleder v. McQuesten, 198 U.S. 141, 143, 25 S.Ct. 616 (1905);

Atchison, T. & S. F. Ry. Co. v. Frederickson, 177 Fed. 206 (9th Cir. 1910);

Int'l Bank & Trust Co. v. Scott, 159 Fed. 58 (5th Cir. 1908);

Jeffcott v. Donovan, 135 F.2d 213 (9th Cir. 1943);

Keene Lumber Co. v. Leventhal, 165 F.2d 815, 818 (1st Cir. 1948).

From all that appears, appellant may well have been a *citizen* of the State of California at the time the action was commenced and thus there would be no diversity jurisdiction since defendants are California corporations. (Complaint III, R. 4; Answer III, R. 9; Amended Complaint II, R. 33; Answer II, R. 40) Rule 8(a)(1) of the Federal Rules of Civil Procedure requires that the complaint contain a short and plain statement of the grounds upon which the trial court's jurisdiction depends. This rule was not complied with. On the record before this Court there is no basis for determining the existence or non-existence of diversity jurisdiction and for that reason the appeal should be dismissed. No federal question is involved.

STATEMENT OF THE CASE.

Appellant originally commenced this action seeking only to recover for alleged breach of his employment contract. (R. 3) Section 2 of the contract (R. 16) provides as follows:

> "The term of this agreement shall be for the period during which the Contractor desires the services of the Employee in connection with construction work in the Western Ocean Division; provided, that after twelve (12) months continuous employment from the date of this agreement, the employee may terminate his employment hereunder by giving the Contractor written notice specifying the date on which he desires to terminate his employment, which date shall not be less than fifteen (15) days after the date of delivery of notice to the Contractor."

Section 10 of the contract (R. 17) provides in part as follows:

> "If, prior to the completion of twelve (12) months' service hereunder, the Employee quits or this agreement is terminated by the Contractor for cause, all wages, travel allowance and other payments shall cease as of the time of quitting or discharge, and the Employee shall thereafter be liable for and shall pay his own costs of living and his own return transportation costs and expenses, and no further obligation shall exist on the part of the Contractor to the Employee. * * *"

The District Court dismissed the original complaint for lack of jurisdiction with leave to amend. It had been stipulated that the cost to appellant of return

transportation was less than $3,000 and the Court determined that such return transportation was the most that appellant could recover under the contract even if he proved he had been discharged without cause. R. 32) Appellant has not appealed from that ruling of the District Court.

The amended complaint attempts to state a claim against appellees for damages for alleged fraudulent representations which induced appellant to enter into the written employment contract. The acts, occurrences and representations upon which appellant's claim is based, as specified in his answer to Interrogatory No. 4 (R. 47-50), are as follows:

(1) Newspaper advertisements in New York City in November and December, 1947, offering employment with appellees in Okinawa under a one-year contract with transportation furnished. (R. 47-48)

(2) Statement by George A. Gardner (appellees' personnel manager in New York City) in New York City in November, 1947 that he could conceive of no objection on the part of management to appellant's engaging in private practice on Okinawa if appellant's own equipment were used and that further details would be worked out with the office in Sausalito, California. (R. 48)

(3) Statement by Robert E. Doyle (appellees' personnel manager at Sausalito, California) on December 5, 1947 that company employees were entitled to dental work of an emergency nature only and that if they wanted other dental work done they would have to ar-

range for it with appellant and pay him for such work. Mr. Doyle gave appellant permission for an extra weight allowance in shipping to Okinawa dental equipment and supplies necessary for complete dental service. (R. 49)

Appellant also states in his answer to Interrogatory No. 4 as follows:

> "I asked Mr. Doyle for a definite contract setting forth the provisions with regard to private work, but he told me that it would not be possible to sign such special contract because only a general contract was available for all employees. He stressed the fact before Mr. Fassett and Mr. Keenan that the contract with the employees called only for emergency dental work and that any work that we might do, other than work of an emergency nature, would be between the patient and myself. (R. 49-50)

Section 22 of the employment contract provides as follows:

> "**SECTION 22. Certification by Employee.**
>
> **"THE EMPLOYEE CERTIFIES TO THE CONTRACTOR THAT HE HAS READ THE FOREGOING AGREEMENT AND THAT HE FULLY UNDERSTANDS ITS TERMS AND CONDITIONS AND FURTHER CERTIFIES THAT THE FOREGOING TERMS AND CONDITIONS CONSTITUTE HIS ENTIRE AGREEMENT WITH THE EMPLOYER, AND THAT NO PROMISES OR UNDERSTANDINGS HAVE BEEN MADE OTHER THAN THOSE STATED ABOVE; AND IT IS SPECIFICALLY**

AGREED BY THE PARTIES HERETO THAT THIS AGREEMENT SHALL BE SUBJECT TO MODIFICATION ONLY BY WRITTEN INSTRUMENT SIGNED BY BOTH THE CONTRACTOR AND THE EMPLOYEE." (R. 17)

The amended complaint alleges that each of the representations relied upon by appellant was false and he was induced thereby to execute the written employment contract; that appellees knew that his employment was terminable at will and that under the rules and regulations of the United States applicable to Okinawa appellant could not engage in private dental practice there. (Amended Complaint VIII, R. 37) Appellant further alleges that after arriving in Okinawa he was notified by appellees that he could not engage in private practice and that his employment was terminable at will; that he was prevented from engaging in private practice; and that his employment was terminated without just cause and against his will. (Amended Complaint IX, R. 37-38) Appellant seeks general damages of $25,000 and special damages of $18,850. (R. 39-40)

QUESTION PRESENTED.

Does appellant have a claim for fraud inducing the execution of a written employment contract where the contract itself stipulates against prior oral representations and otherwise reveals the falsity of prior misrepresentations, if any?

SUMMARY OF ARGUMENT.

There is no triable issue of fact. The stipulation in appellant's employment contract against promises or understanding other than those contained in the written contract itself is a complete bar to appellant's action for damages. Such a provision in a contract protects a principal from liability for damages for the unauthorized misrepresentations of his agents even though it does not preclude rescission of the contract. The contract itself clearly specified that the term of employment was at the will of the employer rather than for one year certain. The contract also warned appellant that his time was not his own and that the rules and regulations of the United States applicable to Okinawa superseded the contract. The falsity of any earlier misrepresentation in regard to the employment term and engaging in private practice was thus revealed to him by the contract itself. Furthermore, appellant *requested, but was refused,* a special contract that would have specifically authorized him to engage in private dental practice. Appellant can not now be heard to complain that he relied on oral promises which he knew the employer refused to agree to in the written contract.

ARGUMENT.

I. APPELLEES ARE NOT LIABLE FOR THE UNAUTHORIZED MISREPRESENTATIONS OF THEIR AGENTS BECAUSE OF THE STIPULATION AGAINST SUCH REPRESENTATIONS IN THE WRITTEN EMPLOYMENT CONTRACT.

Section 22 of appellant's employment contract provides in bold face type that the writing contains his *entire* agreement with appellees AND THAT NO PROMISES OR UNDERSTANDINGS HAVE BEEN MADE OTHER THAN THOSE STATED IN THE WRITING. (R. 17) Similar stipulations in written contracts have been before the California courts on numerous occasions. It is well established in California that such a provision in a contract protects a principal from liability for damages for the oral misrepresentations of his agent although it does not preclude rescission of the contract by timely notice and offer of restitution.

In *Gridley v. Tilson,* 202 Cal. 748, 262 Pac. 322 (1927), the California Supreme Court was confronted with a provision in a contract for the sale of stock which read, "It is understood that no representative has any power to change, modify or make any other terms or representations whatsoever than those herein stated, and that the representative is acting as special agent and all representations not herein set out are by me deemed waived." The Court upheld the validity of this stipulation and stated,

> "It is contended by the plaintiff that the quoted provision of the subscription contract limited the authority of the agents to make only the representations set out in the contract; that the defend-

ant had notice of the limitation and that evidence of any other representations made by the agents should not have been received. This contention must be sustained. While the Civil Code, section 1625, provides that a written contract supersedes all negotiations it has always been the law that fraud in the inducement of a contract may be shown. *A well-settled exception, however, is the case where the party seeking to rely on fraudulent representations of an agent had notice of the limitation on the agent's authority to make representations. Therefore a principal is bound only by the representations embodied in the written contract where a provision in the contract notified the prospective purchaser that the agent's authority went no further.* (Fidelity etc. Co. v. Fresno Flume Co., 161 Cal. 466 [37 L.R.A. (N.S.) 322, 119 Pac. 646]; Pease v. Fitzgerald, 31 Cal. App. 727 [161 Pac. 506]; Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262 [164 Pac. 906]; Munn v. Anthony, 36 Cal. App. 312 [171 Pac. 1082]; Schuster v. North American Hotel Co., 106 Neb. 672 [184 N.W. 136, 186 N.W. 87]; Northern Assur. Co. v. Grand View Building Assn., 183 U.S. 308 [46 L. Ed. 213, 22 Sup. Ct. Rep. 33].) In the case of Pease v. Fitzgerald, supra, the rule was applied under circumstances almost identical with the circumstances in the present case. Defendant, however, attempts to escape the effect of the settled rule of these cases by testifying that he did not have his glasses with him at the time he signed the subscription contract and gave the notes and therefore he did not read the contract nor the provision referred to. But this cannot afford him an excuse in the ab-

> sence of a showing that he was prevented by the agent from reading the limiting clause or was otherwise tricked into signing the document without reading it. He made no request to have the contract read to him. In addition it was in evidence that he had previously signed similar contracts with the same company in subscribing for 3,000 shares of its stock." (202 Cal. at 751-52) (Emphasis supplied.)

The doctrine announced in the *Gridley* case has subsequently been limited to an action for *damages* by the decision in *Speck v. Wylie,* 1 C.2d 625, 36 P.2d 618 (1934). In the latter case a purchaser of real estate sought to recover installment payments after giving the seller timely notice of rescission and offering to restore the premises. It appeared that the purchaser had been induced to buy the property by the misrepresentations made by the seller's agent. The sales contract provided as follows:

> "It is understood and agreed that this contract contains all the covenants, stipulations and provisions agreed upon by the parties hereto and no agent of either party to this contract has authority to alter or change the terms hereof and neither party is or shall be bound by any statement or representation not in conformity herewith."

Despite the sweeping language in *Gridley v. Tilson, supra,* the California Supreme Court permitted the defrauded party to rescind the contract and limited the effect of the quoted stipulation to an action by the defrauded party for *damages* (which is the nature of

the instant case by appellant). After quoting Sections 259 and 260 of the Restatement of Agency, the Court said,

> "Without attempting further elaboration we therefore announce that we are in accord with the above statements of the rule which will, all other things being favorable to the complaining party, allow him to rescind and to pursue the principal far enough to secure a return of the consideration paid. *But an action for fraud and deceit will not be allowed him under such conditions.* The doctrine of Gridley v. Tilson, supra, and such appellate court cases as may have followed it, should be limited in its application by the exception hereinabove set forth." (1 C.2d at 628) (Emphasis supplied.)

In *Harnischfeger Sales Corp. v. Coats,* 4 C.2d 319, 48 P.2d 662 (1935), defendant counterclaimed for damages for fraud in connection with a conditional sales contract for the purchase of a power shovel. The contract provided, "it is hereby further declared, agreed and understood that there are no prior writings, verbal negotiations, understandings, representations or agreements between the parties not herein expressed." The Court said,

> "It seems clear that this stipulation limits the authority of the agent to make representations, and purports to absolve the principal from all responsibility therefor. The question is whether such a stipulation may be given effect.
>
> "This problem was the subject of conflicting decisions in California until recently, when this

Court, in Speck v. Wylie, 1 Cal. (2d) 625 [36 Pac. (2d) 618, 95 A.L.R. 760], announced the governing rule. *It was there held that an innocent principal might by such a stipulation protect himself from liability in a tort action for damages for fraud and deceit, but that the third party would nevertheless be entitled to rescind the contract. This is the rule declared in the Restatement of the Law of Agency, sections 259 and 260.* (See, also, Lozier v. Janss Investment Co., 1 Cal. (2d) 666 [36 Pac. (2d) 620]; Greenberg v. Du Bain Realty Corp., 2 Cal. (2d) 628 [42 Pac. (2d) 628]; Graham v. Los Angeles First Nat. T. & S. Bank, 3 Cal. (2d) 37 [43 Pac. (2d) 543].) The distinction between the two situations is a sound one. The principal would normally be liable in tort for misrepresentations by an agent acting within the scope of his actual or ostensible authority, and by stipulating in the contract that the agent has no such authority, the principal has done all that is reasonably possible to give notice thereof to the third party. Under such circumstances the innocent principal may justly be relieved of liability for the agent's wrong. But where the principal sues to recover on the contract, he is seeking to benefit through the agent's fraud. This he cannot be permitted to do. His personal liability may be avoided, but the fraudulently procured contract is subject to rescission.

"In the instant case, the counterclaim, which seeks the affirmative relief of damages, is objectionable for the same reason that an independent tort action would be. * * *" (4 C.2d at 320-21) (Emphasis supplied.)

In *Schroeder v. Dickinson & Gillespie Corp.*, 6 C.A. 2d 175, 44 P.2d 425 (1935), plaintiffs were nonsuited in their action to hold a bank liable for the false representations made by the agents of the bank's predecessor in interest. The misrepresentations were made in connection with the sale of real estate to plaintiffs pursuant to a written contract which contained a provision that the bank was not liable for any inducement, promise, representation or agreement not set forth therein. In affirming the judgment of nonsuit, the Court said,

> "The contract in evidence shows that it contained a cautionary clause relieving the principal of liability because of any representations made by any selling agent or other person other than is contained in the contract, and the evidence shows that the representations alleged to be fraudulent were made by agents and codefendants of the seller, the respondent bank, that the bank was innocent of any participation in or knowledge of the alleged false representations, and that the bank executed the contract of sale to appellants. Under the recent decision in the case of Speck v. Wylie, 1 Cal. (2d) 625 [36 Pac. (2d) 618, 95 A. L. R. 760], it is held that under such circumstances, no cause of action against the innocent principal may lie for damages for fraud, but that the sole remedy is by timely rescission and an action to recover moneys paid upon the contract. It therefore appears that the motion for a nonsuit was properly granted on the second cause of action under this authority. * * *" (6 C.A.2d at 179)

It is significant that the cases cited and relied upon by appellant at page 17 of his opening brief to overcome the stipulation in the contract against oral representations involve actions of rescission and are thus within the exception of *Speck v. Wylie, supra.* Appellant is not seeking to *rescind* his employment contract but rather to *affirm* it and hold the employer liable for damages for the misrepresentations of the employer's agents. This he can not do because of the stipulation against oral representations.

The other cases cited by appellant in no way meet the issue here presented and each of them is distinguishable on the facts.

II. THE WRITTEN CONTRACT IS INCONSISTENT WITH THE PRIOR ORAL REPRESENTATIONS.

Appellant does not suggest that through some fraud of appellees he was precluded from reading or understanding the employment contract that he admits signing. He is therefore deemed to have intended to enter into the contract in accordance with its precise terms.

Gridley v. Tilson, 202 Cal. 748, 262 Pac. 322 (1927);

Tockstein v. Pacific Kissel Kar Branch, 33 Cal. App. 262, 164 Pac. 906 (1917);

George J. Birkel Co. v. Curtet, 36 Cal. App. 391, 172 Pac. 165 (1918);

cf. *Humphrey v. Harry H. Culver & Co.,* 220 Cal. 765, 32 P.2d 630 (1934).

Since the contract specifically provides for employment at the will of appellees (subject only to the payment of return transportation if the contract is terminated without cause prior to 12 months' service), the contract itself reveals the falsity of the earlier advertisement or solicitation for a one year term of employment.

The contract (R. 16-17) provides in Section 4(a) that appellant "shall work such hours and such shifts as may be required by the Contractor" with appropriate provision in Section 4(b)(2) for compensation for more than 40 hours of work per week. Section 13 of the Contract provides as follows:

> "SECTION 13. Military Authority.
>
> The Employee understands that the various sites of the work are under the supervision of military authority. The Employee agrees that any act or omission by the Contractor inconsistent with the provisions hereof shall be excused if such act or omission shall result from the compliance by the Contractor with any order or regulation of such military authority; provided, that the guaranteed weekly employment, as hereinabove stipulated, shall not be suspended."

And Section 15(c) provides in part as follows:

> "(c) The Employee shall comply with all laws and regulations, both civil and military, applicable at the site of the work and the vicinity thereof, and such other rules and regulations as the Contracting Officer and the Contractor may

> establish from time to time with respect to the personnel employed by the Contractor. * * *"

All of these sections are inconsistent with the alleged oral promises that appellant could engage in private practice. He was plainly on notice that he was subject to perform work for appellees in excess of 40 hours per week; that appellees were required to abide by military regulations; and that he himself had to obey applicable laws and regulations. His amended complaint alleges that "under the rules and regulations of the United States applicable to said Island of Okinawa the said plaintiff could not engage in the private practice of dentistry on said Island." (Amended Complaint VIII, R. 37) Certainly the contract did not misrepresent applicable rules and regulations and in effect warned him not to rely on prior oral representations as to the regulations applicable on Okinawa.

Where the terms of a written contract are inconsistent with prior misrepresentations, an action for fraud will not lie. Thus, in *W. R. Campbell Co. v. Sears, Roebuck & Co.,* 136 Cal. App. 765, 769-70, 29 P.2d 910 (1934), the Court said,

> "* * * In our opinion, however, a distinction must be made between such a parol promise as the one here, which by its very nature is superseded by the final writing, inconsistent with it, and a promise made with no intention of performing the same, not inconsistent with the writing, but which was the inducing cause thereof. We think the former, being evidence of a preliminary agree-

ment entirely superseded by the subsequent writing, is no evidence of the terms of the writing finally agreed upon (Sec. 1856, Code Civ. Proc.), and cannot be relied upon as a fraudulent representation inducing the writing."

Similarly in *Blake v. Paramount Pictures, Inc.*, 22 F. Supp. 249, 252-53 (S.D. Calif. 1938), the Court stated,

> "Here we find *not* an oral representation, omitted from the contract, but a contract in which the parties deal specifically with the matter of the oral representation, and change what might have been an absolute promise into an alternative one, giving one of the parties to the contract the right to substitute another production for one promised. The contract as written is not silent as to the representations or complementary to them. It covers the representations, but specifically provides that, certain contingencies happening, the distributor is not to be bound by them. When this is the case, the other contracting party who complains of misrepresentation must charge fraud in inducing him to sign a contract which did not express the oral promises or representations. See California Trust Co. v. Cohn, 1932, 214 Cal. 619, 7 P.2d 297. Or he must allege that the substituted promises were also made without the intention to perform."

Finally it should be pointed out that appellant was not in a position to rely on the alleged oral misrepresentations in regard to engaging in private practice on Okinawa since he attempted to get a special writ-

ten contract that would so provide and he was refused such a contract. The only reasonable inference from this is that appellant decided to take his chances, knowing full well that he had no binding commitment entitling him to engage in private practice on Okinawa.

CONCLUSION.

For the reasons stated above, the judgment appealed from should be affirmed and the appeal should be dismissed.

Dated, San Francisco, California,
July 19, 1954.

Respectfully submitted,

LLOYD H. BURKE,
United States Attorney,

GEORGE A. BLACKSTONE,
Assistant United States Attorney,

Attorneys for Appellees.